



Ref: OPM/ 0.161 /03/2021

Date: 22/03/2021

To: Mr. Philippe Gautier
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
Netherlands

Dear Sir:

I have the honour of responding to your letter dated 16 March 2021 (No. 154773) in the case concerning *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, transmitting the text of the question put to the Federal Republic of Somalia by Judge Bennouna on 16 March 2021.

Question

"I would like the Somali delegation to clarify its position on Kenya's assertion in its Counter Memorial that boundary pillar 29 at Dar Es Salam, which represents the terminal point of the land boundary, must be connected 'in a south-easterly direction, to the limit of territorial waters in a straight line at right angles to the general trend of the coastline at Dar Es Salam, leaving the islets of DiuaDamasciaca in Italian territory', in accordance with the general description of the boundary as set out in the 1927 Agreement (see in regard paragraphs 33 to 35 of the Counter-Memorial).

My question is therefore as follows: In Somalia's view, does this 1927 Agreement establish the delimitation line of the of the territorial sea between the two Parties and, if so, what would be the outer limit of this line?"

Answer

1. Somalia is grateful for Judge Bennouna's question, and the opportunity to set out its understanding of the 1927 Agreement between Italy and the United Kingdom, and its relevance to these proceedings.

2. The 1927 Agreement reflects the common understanding of both Parties, Somalia and Kenya, on the location of the final, southernmost portion of the land boundary between the two States.

3. Somalia and Kenya agree that the final boundary pillar, identified in the Agreement as Boundary Pillar 29, is located at a point whose geographical coordinates are 1° 39' 43.30" S and 41° 33' 33.49" E.¹ They further agree that, pursuant to the Agreement, the final portion of the land boundary extends from BP 29 in a south easterly direction "in a straight line at right angles to the general trend of the coastline at *Dar es Salaam*".² Somalia depicted the location of the land boundary between BP 29 and its terminus on the Indian Ocean coastline in Figure 4.4 of its Memorial, which was displayed during Mr. Reichler's oral pleading on 16 March, and was included in Somalia's Judges' Folder at Tab 53. Somalia does not understand the Parties to be in disagreement about the location of this final portion of the land boundary.

4. As Judge Bennouna correctly pointed out, the 1927 Agreement provides that the straight line between BP 29 and the coastline continues "to the limit of territorial waters". Although the treaty is silent on the distance between the coastline and that "limit", Kenya points out in its Counter-Memorial that this was understood as 3 M.³ Somalia does not disagree. There is no evidence that either Italy or the United Kingdom ever claimed a territorial sea greater than 3 M for Somalia (then Italian Somaliland) or Kenya.

5. The question thus arises: What significance, if any, does the 1927 Agreement have for the delimitation of the maritime boundary between Somalia and Kenya? Here again, Somalia and Kenya are in agreement: it has none.⁴

6. Neither Somalia nor Kenya, since their independence and at all times thereafter, has ever claimed that the maritime boundary in the territorial sea follows a

¹Reply of Somalia (hereinafter "SR"), para. 3.50; Counter-Memorial of the Republic of Kenya (hereinafter "KCM"), para. 30.

²KCM, para. 33; SR, para. 3.53. See Agreement between Italy and the United Kingdom in which are recorded the decisions of the Commission appointed under Article 12 of the Treaty between His Britannic Majesty and His Majesty the King of Italy, signed at London on July 15, 1924, regulating certain questions concerning the boundaries of their respective territories in East Africa (17 Dec. 1927), Appendix I, First Part. Memorial of Somalia (hereinafter "MS"), Vol. III, Annex 3.

³ KCM, paras. 29, 34.

⁴See SR, paras. 3.53-3.61; Appendix 2 to Kenya's 22 February 2021 Application, paras. 363-368.



line perpendicular to the coast at Dar es Salam, for any distance. Neither Party accepts such a line as constituting a maritime boundary. Neither Party accepts or argues for the 1927 Agreement as binding on them in regard to a maritime boundary, for any distance.

7. To the contrary, as Professor Sands explained in his oral pleading on 15 March, Somalia, since it first identified a maritime boundary with Kenya, has claimed that the boundary follows an equidistance line commencing on the coast at Dar es Salam.⁵ Kenya for its part, claims that the boundary follows a parallel of latitude emanating from that point, although, by its legislation, it has also claimed an equidistance boundary, at least in the territorial sea.⁶

8. Given that neither Party accepts, or has ever accepted, that the boundary in the territorial sea is formed by an extension of the land boundary into the sea at a right angle to the coast at Dar es Salam, and neither Party has asked the Court to adopt such a boundary, it is Somalia's view that this provision of the 1927 agreement is of no significance to the present proceedings.

9. The second part of Judge Bennouna's questionis based on the assumption that the 1927 Agreement establishes a line of delimitation between the Parties in the territorial sea, and asks how far it extends. As indicated above, Somalia does not accept that any line of maritime delimitation, binding on the Parties to these proceedings, was established in 1927, or at any time thereafter. However, in the hypothetical circumstance that such a line was established, Somalia considers that it could not in any circumstance extend beyond 3 M. That appears to be Kenya's view, as well.⁷ This is because neither Italy nor the United Kingdom claimed a territorial sea greater than 3 M for Somalia or Kenya, as of 1927; nor is there any evidence that they did so thereafter. After independence, neither Somalia nor Kenya ever claimed such a line as a territorial sea boundary, much less did they purport to extend it beyond 3 M.⁸

10. The case of *Guyana v. Suriname* is instructive on this point. In 1799, the colonial authorities established the western bank of the Corentyne River as the boundary between "Suriname and Berbice, a colony then situated in the eastern part of modern Guyana".⁹ In 1936, a Mixed Boundary Commission determined that because the entire river fell under Dutch sovereignty, Suriname should control access to the river

⁵ CR2021/02, paras. 54-55.

⁶ CR2021/02, para. 31. See Republic of Kenya, Law No. 2 of 1972, *Territorial Waters Act* (16 May 1972), para. 2(4). MS, Vol. III, Annex 16; Republic of Kenya, Chapter 371, *Maritime Zones Act* (25 Aug. 1989), § 3(4). MS, Vol. III, Annex 20.

⁷ See KCM, paras. 28, 29, 33, 35, 335.

⁸ *Ibid.*, para. 335.

⁹ *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 September 2007, UNRIAA, Vol. XXX, p. 1 (hereinafter "*Guyana v. Suriname*"), para. 137.



from the Atlantic Ocean in the north.¹⁰ To facilitate this, both parties accepted that the boundary in the territorial sea – then 3 M – would follow a line of 10 degrees emanating from the final boundary pillar closest to the coast.¹¹ The treaty that embodied this agreement was never signed, most likely because of the outbreak of World War II, but the colonial powers respected and enforced this boundary, including in the territorial sea, for 30 years.¹²

11. During the arbitral proceedings, Suriname (now independent) argued that the 10 degree line should form the maritime boundary for the entire length of the now-12 M territorial sea, given the parties' historical acceptance of the line and the fact that the Mixed Boundary Commission had not specified the breadth of the territorial sea.¹³ Guyana, which claimed that the boundary should follow an "historical equidistance line", disagreed. It contended that, even if the first leg of the boundary followed a 10 degree line, it should only do so for 3 M, and then connect to an equidistance line by the shortest route.¹⁴

12. The arbitral tribunal decided, unanimously, that although there was no binding treaty between the Parties, there was an "historical arrangement of unusual nature" that the boundary should follow a 10 degree line from the final boundary marker, *but only for 3 M*.¹⁵ It rejected Suriname's submission that the enlargement of the territorial sea from 3 M to 12 M required an extension of the 10 degree line to the new limit,¹⁶ finding that the circumstances that led to the adoption of the 10 degree line did not justify its extension beyond 3 M.¹⁷

13. The arbitral tribunal further decided that, beyond 3 M, the boundary should follow an equidistance line throughout the EEZ and continental shelf, to the 200 M limit claimed by both parties. It then drew a diagonal line to connect the seaward terminus of the 10 degree line (at 3 M) to the equidistance line by the shortest distance.¹⁸ This is depicted in a map attached hereto as Appendix 1.

¹⁰ *Ibid.*, para. 137.

¹¹ *Ibid.*, para. 138.

¹² *Ibid.*, paras. 139, 299.

¹³ *Ibid.*, para. 286.

¹⁴ *Ibid.*, paras. 288, 289.

¹⁵ *Ibid.*, paras. 307, 323.

¹⁶ *Ibid.*, paras. 310, 311.

¹⁷ *Ibid.*, paras. 314, 315.

¹⁸ *Ibid.*, para. 323. See also *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p.303, para. 307 ("The Court notes, however, that point G, which was determined by the two Parties in the Maroua Declaration of 1 June 1975, does not lie on the equidistance line between Cameroon and Nigeria, but to the east of that line. Cameroon is therefore entitled to request that from point G the boundary of the Parties' respective maritime areas should return to the equidistance line.... The Court accordingly considers that from point G the delimitation line should directly join



14. In case the Court were inclined to adopt a similar approach here – in spite of the Parties’ common position that the 1927 Agreement should have no bearing on the delimitation of their maritime boundary in the territorial sea – there would also be a need to connect the end of the 3 M perpendicular line to the equidistance line, if the Court were to agree with Somalia that equidistance constitutes an equitable solution in the circumstances of this case. Somalia’s depiction of such a scenario is attached hereto as Appendix 2, with the proviso that this is not the solution that Somalia seeks, or considers justified. Somalia, to be clear, believes that the entire boundary should be based on equidistance.

15. For the sake of completeness, there is one case in which a divided arbitral tribunal ruled that a continental shelf boundary agreed by France and Portugal in 1960 for their respective colonies, Senegal and Guinea Bissau, should be extended in conformity with the present-day concept of the continental shelf. This became a central issue in the arbitration between Senegal and Guinea Bissau almost three decades later. The arbitral tribunal determined that the 1960 agreement delimited the “continental shelf between the Parties over the whole extent of that maritime space as defined at present”.¹⁹ It understood the agreement as embodying a “dynamic criterion” for determining the breadth of the shelf: that is, “a dynamic conception of the continental shelf, since the outer limit would depend on technological developments and could consequently move further and further to seaward.”²⁰ The same factors did not, however, justify an extension of the boundary in territorial sea and contiguous zone as defined in the 1960 agreement, since these were not subject to the same “dynamic conception” as the continental shelf.²¹

16. The Court subsequently upheld the validity of the arbitral award, without addressing the substantive issues.²² In *Guyana v. Suriname*, the arbitral tribunal considered the *Guinea Bissau/Senegal* award and determined that it had no application to the territorial sea limit.²³

17. Somalia again thanks Judge Bennouna for his question, and it trusts that this response will be deemed satisfactory.

the equidistance line at a point with co-ordinates 8° 21’20” longitude east and 4° 17’00” latitude north, which will be called X. The boundary between the respective maritime areas of Cameroon and Nigeria will therefore continue beyond point G in a westward direction until it reaches point X at the above-mentioned co-ordinates. The boundary will turn at point X and continue southwards along the equidistance line.”)

¹⁹ *Case Concerning the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal, Decision of 31 July 1989*, UNRIAA, Vol. XX, para 85.

²⁰ *Ibid.*, para. 85.

²¹ *Ibid.*

²² *See Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991*, p. 53, para. 69.

²³ *Guyana v. Suriname*, para. 311.



Please accept, Sir, renewed assurances of my highest consideration.

Sincerely,



H.E. Mahdi Mohammed Gulaid
Deputy Prime Minister
Agen
Federal Republic of Somalia



APPENDIX 1



APPENDIX 2

